In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-168

FRED PARKER ANDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Eastern District of Tennessee, petitioner was convicted of violating 18 U.S.C. 2313 by receiving, concealing, storing, and disposing of a pickup truck in interstate commerce, knowing that the truck had been stolen. He was sentenced to three years' imprisonment, with sentence suspended and two years' probation imposed on condition that he be confined four months. The court of appeals affirmed (Pet. App. A 1).

1. The sole issue raised is the sufficiency of the evidence to support the conviction. The evidence at trial

showed that on December 6, 1970, a light green 1971 Ford pickup truck and an attached camper, bearing an Alabama license plate, were stolen from their owner in Alabama (Tr. 5-8). On December 8, 1970, the sheriff covering Decherd, Tennessee, was notified that a stripped pick-up truck had been abandoned on a roadside (Tr. 17). The frame bore the identification number of the stolen vehicle (Tr. 61, 11). A subsequent search of the premises of petitioner's co-defendant, Franklin Davis,[1] turned up various parts of the Ford pickup truck (Tr. 20, 60, 63) which were later identified by the owner (Tr. 13).

The evidence established that on a day in early December, 1970, petitioner, who operated a garage in Decherd, Tennessee, showed a customer a light green pickup truck with Alabama tags with a camper on the rear. Petitioner said a boy wanted to sell the camper (Tr. 42-44) separately from the truck. The customer offered $100 which petitioner later telephoned was acceptable. The camper was delivered the next day (Tr. 46, 48). Late that evening, petitioner told the buyer that the camper had been stolen and advised him to get rid of it (Tr. 49). The buyer turned it over to the sheriff (Tr. 49). It was identified by the owner (Tr. 14-15), as the pickup truck had been.

There was also evidence from which the jury was entitled to find that the camper had been dismantled from the pickup truck, prior to its delivery, by petitioner and Franklin Davis. (Tr. 22, 23, 24, 39-40, 42-43). In early December, a neighbor of Davis saw the petitioner and

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[1] Davis was separately tried and convicted.

Davis back a green Ford pickup truck with camper attached into Davis's garage and then heard banging noises. The following morning the camper was lying on the ground outside the garage (Tr. 23).[2]

Petitioner, when contacted during the F.B.I. investigation, stated that he knew nothing about a stolen truck, and denied any knowledge of a camper or having been involved in any deal with a truck (Tr. 65).

2. Petitioner contends that the evidence of his guilt was legally insufficient to sustain his conviction. He argues that in a case resting "purely upon circumstantial evidence," the government must "exclude every reasonable hypothesis but that of guilt." We submit that the evidence here was sufficient to satisfy that standard. But in any event it is settled that even in a circumstantial evidence case the government need not "exclude every reasonable hypothesis but that of guilt." In *Holland* v. *United States,* 348 U.S. 121, 139-140, the Court held that this formulation was inappropriate for a jury instruction. It is even less appropriate as a standard of appellate review where the record is examined "not for the purpose of weighing the evidence but only to ascertain whether there was some competent and substantial evidence before the jury fairly tending to sustain the verdict." *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 254. Since the *Holland* decision, all the courts of appeals have aban-

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[2] When the pickup truck was recovered by the sheriff its "Philco" radio was missing (Tr. 9). A "Philco" radio identical to that which belonged in the stolen pickup truck was traced to one Paul McDaniel (Tr. 54-55, 13). McDaniel testified that petitioner had given him the radio.

doned this circumstantial evidence formula which petitioner advances.[3] While the Fifth Circuit for some time after *Holland* adhered to that formula, it is now "in agreement with * * * other circuits that whether the evidence be direct or circumstantial, the matter of the defendant's guilt is for the jury to decide unless the court concludes that the jury must necessarily have had a reasonable doubt." *United States* v. *Warner,* 441 F. 2d 821, 825 (C.A. 5).[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1972.

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[3] See, *e.g., Dirring* v. *United States,* 328 F. 2d 512 (C.A. 1), certiorari denied, 377 U.S. 1003; *United States* v. *Aadal,* 368 F. 2d 962 (C.A. 2), certiorari denied, 386 U.S. 970; *United States* v. *Boyle,* 402 F. 2d 757 (C.A. 3), certiorari denied, 394 U.S. 934; *United States* v. *Chappell,* 353 F. 2d 83 (C.A. 4); *United States* v. *Prieur,* 429 F. 2d 1237 (C.A. 6); *Sablan* v. *People of Territory of Guam,* 434 F. 2d 837 (C.A. 9) *United States* v. *Turner,* 421 F. 2d 252 (C.A. 10); *United States* v. *Kye,* 411 F. 2d 120, 122 (C.A. 8).

[4] Petitioner's claim that "several Circuits are in disagreement" on the issue (Pet. 5) is based upon decisions which have either been expressly or implicitly rejected in subsequent cases. Compare *United States* v. *Garza,* 426 F. 2d 949 (C.A. 5), and *Urguidi* v. *United States,* 371 F. 2d 654 (C.A. 9), certiorari denied, 389 U.S. 879, cited by petitioner (Pet. 5), with *United States* v. *Warner,* 441 F. 2d 821, 825 (C.A. 5), and *Sablan* v. *People of Territory of Guam,* 434 F. 2d 837 (C.A. 9).

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